

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 13 December 2012

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

**URGENT
Public**

**Decision on the temporary suspension of the proceedings pursuant to
Regulation 55(2) of the Regulations of the Court and related procedural
deadlines**

Order to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Aimé Kilolo Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines (“Decision”).

I. Background and Submissions

1. On 21 September 2012, the Chamber issued its “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” (“Regulation 55 Notification”).¹ In its decision, the Chamber informed the parties and participants that – after having heard all the evidence and when making its decision under Article 74 of the Rome Statute (“Statute”) – the Chamber may modify the legal characterisation of the facts pursuant to Regulation 55 of the Regulations of the Court (“Regulations”).² The possible change envisaged by the Chamber is as follows: “in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i) of the Statute, namely that owing to the circumstances at the time, the accused ‘should have known’ that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed in the decision on the Confirmation of Charges.”³ The Chamber further requested the parties and participants to make submissions on the procedural impact of the notification.⁴
2. On 8 October 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Submission on the Procedural Impacts of Trial Chamber’s

¹ Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012, ICC-01/05-01/08-2324.

² ICC-01/05-01/08-2324, paragraphs 4 and 5.

³ ICC-01/05-01/08-2324, paragraph 5.

⁴ ICC-01/05-01/08-2324, paragraph 6.

Notification pursuant to Regulation 55(2) of the Regulations of the Court”,⁵ in which it submits that the Chamber’s Regulation 55 Notification has no impact on the prosecution case.⁶ In addition, the prosecution submits that its theory of the case is consistent with the possible change to the legal re-characterisation of the facts and that the same evidence presented by the prosecution to prove that the accused had actual knowledge also proves that “owing to the circumstances at the time [he] should have known”.⁷ The prosecution further emphasises that during the presentation of its case it led evidence on facts – and the defence questioned and challenged the prosecution’s witnesses on these facts – including the coverage by the international media of the crimes committed by the *Mouvement de Libération du Congo* (“MLC”), the visits by the accused to the Central African Republic during the relevant period under examination, the MLC’s reporting system and the MLC’s alleged communication system.⁸

3. On 3 and 8 October 2012, the legal representatives of victims filed their submissions.⁹ Mr Zarambaud submits, *inter alia*, that the modification of the legal characterisation of facts is in the interests of victims.¹⁰ Ms Douzima argues, *inter alia*, that it is in the Chamber’s powers to change the legal characterisation of the facts.¹¹ Neither of them raised any procedural issues arising out of the Chamber’s Regulation 55 Notification.

⁵ Prosecution’s Submission on the Procedural Impacts of Trial Chamber’s Notification pursuant to Regulation 55(2) of the Regulations of the Court, 8 October 2012, ICC-01/05-01/08-2334.

⁶ ICC-01/05-01/08-2334, paragraph 13.

⁷ *Ibid.*

⁸ ICC-01/05-01/08-2334, paragraphs 10 and 18.

⁹ Observations du Représentant légal Maître Zarambaud Assingambi sur la décision de la Chambre de première instance III du 21 septembre 2012 signalant aux parties et aux participants que la qualification juridique des faits pourrait faire l’objet de modification, conformément à la norme 55-2 du Règlement de la Cour (ICC-01/05-01/08), 3 October 2012, ICC-01/05-01/08-2328-Conf ; Observations de la Représentante légale de victimes sur la décision de la Chambre de première instance III du 21 septembre 2012, 8 October 2012, ICC-01/05-01/08-2335-Conf.

¹⁰ ICC-01/05-01/08-2328-Conf, paragraph 4.

¹¹ ICC-01/05-01/08-2335-Conf, page 4.

4. On 18 October 2012, the defence for Mr Jean-Pierre Bemba (“defence”) filed its “Defence Submissions on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court”,¹² in which it raises a number of substantive objections to a possible change of the legal characterisation of the facts. On the procedural impact, the defence submits that, at a minimum, the envisaged change may require (i) recalling prosecution witnesses; (ii) being provided with a detailed notice of the relevant material facts; (iii) further defence investigations; (iv) additional time to identify and interview potential witnesses; (v) further requests for assistance from various governments and/or organisations; (vi) additional disclosure requests from the prosecution; and (vii) a meaningful period of time to investigate and prepare.¹³ The defence further urged the Chamber to “render a reasoned decision in a timely fashion in order to minimize the impact of the issue upon the continuing process.”¹⁴

5. On 19 November 2012, the Chamber issued its “Decision requesting the defence to provide further information on the procedural impact of the Chamber’s notification pursuant to Regulation 55(2) of the Regulations of the Court”,¹⁵ in which it requested the defence to provide concrete information and relevant justifications in relation to (i) which prosecution witnesses the defence would intend to recall; and (ii) the envisaged time needed for further defence investigations and preparations.¹⁶ In its decision, the Chamber emphasised once again that a change to the legal characterisation of the facts, if any, will ultimately be made by the Chamber in its decision under Article

¹² Defence Submissions on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court, 18 October 2012, ICC-01/05-01/08-2365-Conf. A public redacted version of this document was filed on the same day.

¹³ ICC-01/05-01/08-2365-Red, paragraphs 29 and 42.

¹⁴ ICC-01/05-01/08-2365-Red, paragraph 51.

¹⁵ Decision requesting the defence to provide further information on the procedural impact of the Chamber’s notification pursuant to Regulation 55(2) of the Regulations of the Court, 19 November 2012, ICC-01/05-01/08-2419.

¹⁶ ICC-01/05-01/08-2419, paragraph 8.

74 of the Statute.¹⁷ Further, it reiterated that such a change in the legal characterisation of the facts would only be made without exceeding the facts and circumstances described in the charges, as confirmed by the Pre-Trial Chamber.¹⁸

6. On 30 November 2012, the defence filed its “Defence further submission on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge” (“Defence’s Additional Submission”),¹⁹ in which, *inter alia*, it requests the Chamber to provide further details of the material facts and circumstances upon which it intends to rely for the proposed re-characterisation under Regulation 55 of the Regulations.²⁰ In addition, in its confidential *ex parte* Annex A, the defence provides the Chamber with more detailed and concrete information as requested.²¹

7. On 11 December 2012, the prosecution filed its “Prosecution’s Request for Re-Classification of a Document pursuant to Regulation 23bis(3) of the Regulations of the Court and Leave to Respond”,²² in which it argues that the defence’s argument supporting the *ex parte* classification of its Annex A to the Defence’s Submission is without merit.²³ In order to be in a position to make meaningful observations on the steps to be taken to address any potential prejudice to the accused resulting from the Regulation 55 Notification, the

¹⁷ ICC-01/05-01/08-2419, paragraph 6.

¹⁸ ICC-01/05-01/08-2419, paragraph 7.

¹⁹ Defence further submission on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge, 30 November 2012, ICC-01/05-01/08-2451-Conf-Exp, with Public Redacted Version ICC-01/05-01/08-2451-Red and confidential *ex parte* defence only Annex A ICC-01/05-01/08-2451-Conf-Exp-AnxA.

²⁰ ICC-01/05-01/08-2451-Red, paragraph 34.

²¹ ICC-01/05-01/08-2451-Red, paragraph 33 and ICC-01/05-01/08-2451-Conf-Exp-AnxA. The Chamber notes that the present decision refers to matters addressed in the context of that confidential *ex parte* Annex. While some of the matters referred therein should remain *ex parte* at this stage, the Chamber is of the view that in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, this Decision makes reference to information that the Chamber considers not to warrant *ex parte* treatment at this time.

²² Prosecution’s Request for Re-Classification of a Document pursuant to Regulation 23bis(3) of the Regulations of the Court and Leave to Respond, 11 December 2012, ICC-01/05-01/08-2477-Conf.

²³ ICC-01/05-01/08-2477-Conf, paragraph 8.

prosecution requests the re-classification of Annex A to the Defence's Submission and seeks leave to respond to it within a reasonable time.²⁴

8. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 28(a), 30, 64(2), (8)(b) and (9), 66(2), 67(1), 69 and 74(2) of the Statute, Rules 63(2) and 78 of the Rules of Procedure and Evidence and Regulations 28(2), 43, 54 and 55 of the Regulations.

II. Analysis

The defence's request for notice of the material facts and relevant circumstances underlying the proposed re-characterisation

9. In its Additional Submission, the defence reiterates its request that the Chamber provide the accused with "precise details of the facts and circumstances as confirmed by the Pre-Trial Chamber in the Confirmation Decision upon which it intends to rely for the proposed re-characterisation under Regulation 55."²⁵ The defence argues that this alleged lack of notice by the Chamber would make it "impossible for the defence to respond to the Chamber's request in any meaningful way",²⁶ because the defence "cannot be expected to guess what such a case might have consisted of and what evidence would have been advanced in support of it."²⁷
10. As held by the Appeals Chamber, and reiterated throughout the present proceedings, Article 74(2) of the Statute confines the scope of Regulation 55 of the Regulations to the facts and circumstances described in the charges and

²⁴ ICC-01/05-01/08-2477-Conf, paragraphs 8 and 9.

²⁵ ICC-01/05-01/08-2451-Red, paragraph 23.

²⁶ ICC-01/05-01/08-2451-Red, paragraph 13.

²⁷ *Ibid.*

any amendment thereto.²⁸ Pursuant to these provisions, the Trial Chamber is indeed bound by the facts and circumstances as confirmed at pre-trial stage in the decision on the confirmation of charges.²⁹ That notwithstanding, the Trial Chamber has the power to modify the legal characterisation of those facts and circumstances, as long as the modification does not exceed them.³⁰

11. In the present case, as repeatedly stressed, the only potential change envisaged by the Chamber, if any, is to “modify the legal characterisation of the facts so as to consider in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i) of the Statute, namely that owing to the circumstances at the time, the accused ‘should have known’ that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed in the Decision on the Confirmation of Charges.”³¹ Accordingly, pursuant to Article 74(2) of the Statute and Regulation 55 of the Regulations, the sole facts and circumstances that may be relevant for the envisaged re-characterisation are those upon which the form of knowledge contained in Article 28(a)(i) of the Statute is based in the charges, i.e. paragraphs 478 to 489 of the Decision on the

²⁸ Judgement on the appeals of Mr Lubanga Dyilo and the Prosecutor against the decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, paragraph 93; ICC-01/05-01/08-2324, paragraph 3 and ICC-01/05-01/08-2419, paragraph 7.

²⁹ ICC-01/04-01/06-2205, paragraph 93 ; See also Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836, paragraphs 35 and 37.

³⁰ As is the case in many domestic legal traditions. See, *inter alia*, France: Cour de Cassation, Cass. Crim., 22 April 1986, in Bulletin Criminel, No. 136 ; Belgium: Cour de Cassation, Cass. 21 January 1992, AR 5404 and Cass. 2 December 1997, AR P960834N; the German Code of Criminal Procedure, Section 265; the Japanese Code of Criminal Procedure, Article 312; the Italian Code of Criminal Procedure, Article 521; the Spanish Code of Criminal Procedure, Article 733; the Portuguese Code of Criminal Procedure, Articles 339, 358 and 359; the Brazilian Code of Criminal Procedure, Articles 383 and 384; and the Austrian Code of Criminal Procedure, Section 262. With some differences but also considering the possibility see, for example, Rule 31 of the US Federal Rules of Criminal Procedure, Section 270 of the South African Criminal Procedure Act 1977, and, in England and Wales, Section 6(3) of the Criminal Law Act 1967.

³¹ ICC-01/05-01/08-2324, paragraph 5.

Confirmation of Charges and paragraphs 77 to 90 of the Second Amended Document Containing the Charges.³²

12. In addition, given the prosecution's submission that the possible change envisaged by the Chamber would have no impact on the prosecution case and that no additional evidence would be presented to prove it,³³ the defence's allegation that it "cannot be expected to guess what such a case might have consisted of and what evidence would have been advanced in support of it"³⁴ is not tenable. To the contrary, the facts and circumstances, as well as the evidence submitted in order to prove them, are exactly the same. There is therefore no new "case to answer",³⁵ as alleged by the defence.

The temporary suspension of the proceedings within the meaning of Regulation 55

13. Pursuant to Regulation 55(2) and (3)(a) of the Regulations, when the possibility of a change to the legal characterisation of the facts is envisaged at any time during the trial, the Trial Chamber "may suspend the hearing and ensure that the participants [and particularly the accused] have adequate time and facilities for effective preparation".
14. In the confidential *ex parte* Annex A to the Defence's Additional Submission, the defence anticipates the need for further investigations and preparation in order to "meet the proposed amended case against the accused."³⁶ The defence then suggests a specific period of time required to undertake further investigations, interview potential witnesses and others with relevant

³² See, in particular, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paragraphs 478 to 489 and Prosecution's Submission of the Revised Second Amended Document Containing the Charges, 18 August 2010, Annex A, ICC-01/05-01/08-856-Conf-AnxA, paragraphs 77 to 90.

³³ ICC-01/05-01/08-2419, paragraph 7, referring to ICC-01/05-01/08-2334, paragraph 13.

³⁴ ICC-01/05-01/08-2451-Red, paragraph 13.

³⁵ Borrowing the same language used by the defence, see ICC-01/05-01/08-Red, paragraph 35.

³⁶ ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 5.

information, and to initiate further requests for assistance from various government and/or organisations and/or press bodies, to review and gather relevant material.³⁷ The defence stresses that the amount of time requested was calculated on the basis that the current proceedings were suspended for the entirety of this phase of investigations.³⁸

15. The Chamber has considered the need to strike a balance between its obligation to ensure that the trial is fair and expeditious and that the accused is tried without undue delay and its duty to ensure the right of the accused to have adequate time and facilities for the preparation of his defence. Taking into account that, as previously stressed, the prosecution will not submit any additional evidence in support of the potential change to the legal characterisation of the facts and circumstances relevant to the form of knowledge contained in Article 28(a)(i) of the Statute, the Chamber is of the view that a temporary suspension of the proceedings, until 4 March 2013, would serve the purpose of providing the accused with adequate time for the effective preparation of his defence.

Potential witnesses to be recalled by the defence

16. In its Additional Submission, the defence submits that it would need to re-examine certain witnesses called by the prosecution.³⁹ The Chamber is mindful that, pursuant to Regulation 55(3)(b) of the Regulations and if determined necessary by the Chamber, the accused shall be given the opportunity to question witnesses who have already testified before the Court.

³⁷ *Ibid.*

³⁸ ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 6.

³⁹ ICC-01/05-01/08-2451-Conf-Exp-AnxA, paragraph 3.

17. The Chamber is of the view that in order to assess the potential necessity for specific witnesses to be recalled, it needs to be provided with more detailed information on the justification for questioning on the alternative form of knowledge contained in Article 28(a)(i) of the Statute. In addition, the Chamber deems it necessary to consider the possible observations the prosecution may have in relation to the defence's intention to recall witnesses.

Additional evidence to be submitted by the defence

18. Pursuant to Regulation 55(3)(b) of the Regulations, if determined necessary by the Chamber, the accused shall be given the opportunity "to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e)."

19. In case the defence intends to submit into evidence or use during questioning of witnesses additional items not previously disclosed to the prosecution, it should disclose them and/or permit the prosecution to inspect any additional Rule 78 material, as soon as it makes the decision to use an item, and in any event no later than 16.00 on 4 March 2013. The Chamber stresses that this deadline for disclosure and inspection of additional materials that the defence may intend to use, is without prejudice to any subsequent determination by the Chamber – in accordance with the three part test of relevance, probative value and potential prejudice – of the eventual admissibility into evidence of each item.

20. In the event that the defence intends to call new witnesses for the specific purpose of providing testimony that will be of relevance to the legal characterisation of the facts and circumstances related to the alternative form of knowledge contained in Article 28(a)(i) of the Statute, it should seek the Chamber's authorisation to do so. For that purpose, the defence should

submit no later than 16.00 on 4 March 2013, a complete list with (i) the identity of its additional witnesses, (ii) the exact justification for the need to call each additional witness; (iii) their estimated length of questioning; (iv) full statements signed by the witnesses or, at a minimum, a detailed summary of the issues to be addressed during the witnesses' testimony and its relevance to the envisaged possible modification to the legal characterisation of the facts. Thereafter, the Chamber will render in due course a decision on the need for and relevance of any of the additional witnesses proposed by the defence.

The prosecution's request for re-classification and leave to respond

21. As relevant information contained in Annex A to the Defence's Additional Submission has been made available to the prosecution and the legal representatives in the present Decision, the Chamber considers that, at this stage, the prosecution's request for reclassification of Annex A to the Defence's Submission has been addressed. In addition, as the prosecution will be given an opportunity to respond to any potential defence request to recall witnesses, the Chamber finds the request for leave to respond moot.

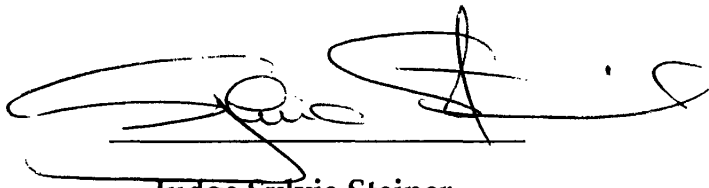
III. Conclusion

22. In view of the foregoing, and subject to any further decision on the matter, the Chamber hereby:


- (i) temporarily suspends the proceedings and decides that the presentation of evidence by the defence will recommence on 4 March 2013 at 9.00;

- (ii) orders the defence to provide by no later than 16.00 on 18 February 2013, on a confidential basis, a detailed list of the witnesses it intend to recall, indicating the precise justification for each witness to be re-examined by the defence and specifying the relevant aspects of their testimony that would be revisited, by way of reference to the exact page(s) and line(s) of the transcripts in relation to which each witness would be requested to testify;
- (iii) instructs the prosecution to provide its observations in response, if any, by no later than 16.00 on 4 March 2013;
- (iv) orders the defence to disclose and/or permit the prosecution to inspect any additional Rule 78 material as soon as it decides to use an item, and in any event by no later than 16.00 on 4 March 2013;
- (v) orders the defence to submit by no later than 16.00 on 4 March 2013, a complete list with (i) the identity of any additional prospective witnesses it intends to call, (ii) the precise justification for the need to call each additional witness; (iii) their estimated length of questioning; (iv) full statements signed by the witnesses or, at a minimum, a detailed summary of the issues to be addressed during the witnesses' testimony and its relevance to the envisaged possible modification to the legal characterisation of the facts.

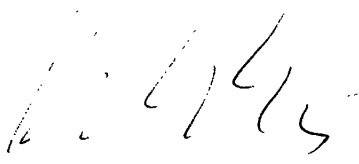
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 13 December 2012

At The Hague, The Netherlands